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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [redacted] 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

vs.

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE.
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

AND

BRIEF OF SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC & GULF DISTRICT, AFL-CIO, AS AMICUS CURIAE

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The Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO, hereby respectfully moves for leave to file a brief as *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for petitioner was requested but refused.

The interest of the Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO, in this case arises from the fact that it was a party to and the initiator of the National Labor Relations Board proceedings which resulted in the decisions of the National Labor

Relations Board in *Peninsular & Occidental (P & O) Steamship Company*, 120 NLRB 1097, 42 LRRM 113 (1958); *West India Fruit & Steamship Company*, 130 NLRB No. 46, 47 LRRM 1269 (1961); *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961) and *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961). The *West India Fruit & Steamship Company* case and the *Peninsular & Occidental Steamship Company* case are currently pending before the United States Court of Appeals for the Fifth Circuit, and that Court has postponed hearing and oral argument of these causes until after the decision of this Court is rendered in this instant case. These two cases in the U.S. Court of Appeals for the Fifth Circuit are *West India Fruit & Steamship Company, Inc., petitioner*, v. *National Labor Relations Board, respondent*, No. 18,929, C.A. 5; and *National Labor Relations Board, petitioner*, v. *Peninsular & Occidental Steamship Company and Green Trading Company, respondents*, No. 19,451, C.A. 5. The cases before the United States Court of Appeals for the Fifth Circuit and the instant case all involve the same issue of law concerning the jurisdiction of the National Labor Relations Board under the National Labor Relations Act over Employers operating foreign-flag vessels in the foreign commerce of the United States.

Since the instant case involves a foreign-flag vessel which is not owned by American citizens, either directly or indirectly, whereas the cases pending in the United States Court of Appeals for the Fifth Circuit in which movant is interested do involve vessels owned and controlled by United States citizens and transferred from the American flag to a foreign flag-of-convenience, it is reasonable to expect that the arguments in support of the jurisdictional reach of the National Labor Relations Act to the operations of American ship owners who nominally register their vessels with foreign nations while continu-

ing to operate in the American economy will not be fully presented by either party. In addition, movant would like to present to the Court for its consideration, arguments concerning the legislative history of the National Labor Relations Act, as amended, which are not referred to in the decisions of the courts below and which may not be presented to this Court if the parties pursue their same course of argument to this Court as they did below. These arguments concerning the legislative history of the Act and concerning the jurisdictional reach of the Act to cover American-owned and American-operated vessels flying foreign flags-of-convenience bear directly upon the basic issues in this case and may be dispositive thereof.

Respectfully submitted,

NEAL RUTLEDGE,
Counsel for Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO, movant for leave to file brief as amicus curiae

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The most significant development during the past decade in the maritime industry has been the formation of a gigantic fleet of vessels nominally registered in and flying the flags of certain small foreign nations (principally Panama, Liberia and Honduras) but owned, controlled and operated outside the economy of the flag nation by nationals of other, larger nations, principally the United States. This fleet has grown to the point, for example, where today Liberia, a small nation with an agricultural

economy and minuscule foreign trade, possesses the largest and most modern tanker fleet in the world.[1]

This remarkable growth of the PanLibHon fleet, as it is called in the industry, is largely accounted for by the transfer of vessels from the American flag to PanLibHon flags-of-convenience and by the registering of new vessels, constructed abroad, belonging to American nationals with PanLibHon nations. Thus, it is estimated that from forty to fifty per cent of the PanLibHon fleet is in fact owned and controlled by American interests.[2] These vessels nevertheless continue to serve largely American commerce; they have virtually no connective link with the nation of registry. As a direct consequence, approximately 33,000 seaman's jobs formerly held by American seamen in American foreign commerce are now filled by foreigners under wage rates and working conditions vastly lower than American standards. Employment on American-flag vessels has dropped sharply from 158,860 positions in 1945, to 84,300 in 1951, to 57,507 in 1955, and to 49,281 in 1960.[3] Working conditions on board these PanLibHon vessels are, in many instances, redolent of the old "glory holes" prevailing in the American merchant marine before union organization and remedial legislation became effective.

For these reasons the Seafarers' International Union of North America, Atlantic & Gulf District, AFL-CIO (hereinafter referred to as SIU) is vitally concerned as an

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[1] Whereas the American tanker fleet, which ranks fourth in the world, is 58% composed of obsolete vessels over 15 years old the Liberian tanker fleet is predominantly (57%) under five years old. OEEC, *Maritime Transport* 1960 (May 2, 1961), at p. 53.

[2] OEEC, *Maritime Transport* 1960 (May 2, 1961), at p. 53. Apparently American oil companies, in particular, have promoted the move to flags-of-convenience. OEEC, *Study on the Expansion of the Flags of Convenience Fleets*, at pp. 4-5 (Jan. 31, 1958).

[3] *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet before the Subcommittee on Merchant Marine*, 85th Cong., 1st Sess., at p. 715 (1957).

American labor organization representing seamen not only with the growth of this flag-of-convenience fleet but with the fleet operators' concerted effort to resist union organization and to resist the National Labor Relations Board's assertion of jurisdiction in regard to such organizational attempts.

As early as November, 1957, the SIU invoked the jurisdiction of the National Labor Relations Board over a vessel beneficially owned by two American railroads which had discharged its American, union crew; changed its flag from American to Liberian; and then proceeded to operate as a cruise ship out of Florida ports in the United States foreign commerce substantially as it had been previously operating. After a full-scale hearing, and lengthy deliberation, the National Labor Relations Board in May of 1958 in a published and well-publicized decision[4] found that it had jurisdiction over such a vessel despite its foreign flag. Thereafter a secret ballot election was conducted in Miami and the SIU was duly certified as exclusive bargaining representative of the crew.

Petitioner, in the instant case, now asserts to this Court that the foreign flag of a vessel, of and by itself, precludes the application of the National Labor Relations Act to such a vessel. It is this contention which vitally and materially affects the cases pending in the United States Court of Appeals for the Fifth Circuit, referred to by the SIU in its motion for leave to file this brief as amicus curiae, and it is this contention by petitioner which the SIU, briefly and without duplication of the exhaustive arguments which will be made by both parties to this Court, would herein respectfully refute as follows:

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[4] *Peninsular & Occidental* (P & O) *Steamship Company*, 120 NLRB 1097, 42 LRRM 113 (1958).

(1) The United States clearly has the power to apply its labor laws to foreign-flag vessels operating in the commerce of the United States.

While this point is not disputed, and was recognized by the New York Court of Appeals below, its fundamental importance to the issues in this case should not be lost in the maze of contentions and considerations concerning the jurisdictional reach of the National Labor Relations Act. The basic fact remains that there is no overriding authority which flatly holds that the United States cannot apply U.S. labor laws to a vessel flying a foreign flag. The decisions of this Court in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 372; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 142; *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 124; and in *Wildenhaus's Case* 120 U.S. 1, recognize the power of Congress to apply its enactments to foreign-flag vessels operating in American commerce as beyond question.

(2) The pre-1959 legislative history of the National Relations Act establishes that Congress did not intend to exclude all foreign-flag vessels, ipso facto, from coverage of the National Labor Relations Act regardless of their predominant connection with the economy and commerce of this Nation and their lack of connection with the economy and commerce of any other nation.

Petitioner sets forth on pp. 27-29 of its brief examples where Congress has by express language applied its legislative enactments to foreign-flag vessels. It argues, from these examples, that where Congress intended a statute to apply to foreign-flag shipping it has expressly so provided, and where no such express coverage is contained in an act, the intent of Congress to exclude all foreign-flag shipping should be inferred.

While the simplicity of this argument is appealing, such a litmus-paper test is woefully inadequate and misleading. The argument is categorically refuted, for example, by the decisions of this Court in such cases as: *Brown* v. *Duchesne*, 60 U.S. 183; *Uvicac* v. *Jarka Co.*, 282 U.S. 234; *Lauritzen* v. *Larsen*, 345 U.S. 571; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354; *Marino Cooks* v. *Panama Steamship Co.*, 362 U.S. 365; *Cunard Steamship Co., Ltd.* v. *Mellon* 262 U.S. 100; and *Scharrenberg* v. *Dollar Steamship Co.*, 245 U.S. 122. In each of these cases this Court was called upon to decide whether an act of Congress which was expressly silent on the matter applied to a foreign-flag vessel. In each case the Court reached its conclusion concerning application, *vel non*, of the act based upon the purposes of the legislation, the particular nature of the foreign-flag operation involved, and all of the surrounding circumstances. In short, there is not and never has been such a simple rule as the one urged by petitioner that Congressional legislation does not apply to any foreign-flag vessel unless the legislation expressly provides otherwise. Instead, the inquiry in each case has been, as stated by Mr. Justice Holmes in *Uvicac* v. *Jarka Co.*, 282 U.S. 234, 249:

> "* * * not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them."

Petitioner also argues, somewhat inconsistently, that the language of the Maritime Labor Act, passed by Congress in 1938, three years after the National Labor Relations Act, shows that Congress did not intend to apply the National Labor Relations Act to any foreign-flag vessels, despite the broad language or "literally universal words"

of the NLRA. Thus, petitioner points to the fact that the Maritime Labor Act contained express language that its provisions should not apply to foreign-flag vessels and argues that since the policies of the NLRA and the Maritime Labor Act are similar, the express limitation contained in the Maritime Labor Act modifies, somehow, the broad language in the NLRA. It is respectfully submitted that such logic is obviously specious. The fact that both statutes were enacted within a few years of each other and that both concerned labor relations in the maritime industry shows that Congress was deliberate in its use of broad language in the NLRA and equally deliberate in its exclusion of foreign-flag vessels from the Maritime Labor Act. In other words, the explicit exclusion of foreign-flag vessels from the Maritime Labor Act supports the implicit inclusion of such vessels within the coverage of the NLRA where the circumstances of their operation and the policy of the Act would require their coverage. Congress, knowing full well how to exclude *all* foreign-flag shipping from the scope of its legislation, as shown by the MLA, chose not to make such a sweeping exclusion from the broad language of the NLRA.

Finally, the review of the NLRA's pre-1959 legislative history by this Court in the *Benz* case establishes that foreign registry, alone and by itself, does not exempt an Employer from the Act. The Court there concluded that the NLRA was intended to apply to "industrial strife between American employers and employees." Accordingly, the Court there did not limit its inquiry merely to the flag or registry of the *S. S. Riviera*, but stated significantly that:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the

laws of another nation. *The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.*" (Emphasis added.)

See, also, *Marine Cooks* v. *Panama Steamship Co.*, 362 U.S. 365, 371. In short, the flag or registry of the vessel was merely one circumstance considered and certainly not the conclusive one.

Indeed, virtually every time this Court, and other courts, have been confronted with petitioner's argument that the registry of a vessel alone is conclusive against application of general legislation, the argument has been rejected. *Lauritzen* v. *Larsen*, 345 U.S. 571, 582; *Romero* v. *International Term. Co.*, 358 U.S. 354, 382; *Marine Cooks* v. *Panama SS. Co.*, 362 U.S. 365; *Gerradin* v. *United Fruit Co.* (C.A. 2), 60 F. 2d 927, cert. den., 287 U.S. 642; *Navios Corp.* v. *Maritime Union* (Pa. S.Ct.), 166 A.2d 625, cert. den., 366 U.S. 905; *Bartholomew* v. *Universe Tankship, Inc.* (C.A. 2), 263 F.2d 437, 440-441, cert. den., 359 U.S. 1000; *Afran Transport* v. *National Maritime Union* (D.C. S.D. N.Y.), 169 F. Supp. 416 (cited with approval in *Marine Cooks*, 362 U.S. at 371, n. 12).

In lieu of petitioner's *ipso facto* flag contention, this Court and others in the cases cited have instead looked to all the points of contact or connecting factors between the vessel, this Nation, and other nations in the light of the policy of the Act involved. In short, it is each and every contact point, not merely the place of registry, which must be taken into consideration in determining the application of general legislation to vessels operating in the American economy and in American commerce.[5]

[5] The fact that foreign-flag shipping can have a very direct and severe effect not only on American foreign commerce but on its domestic economy

(3) The legislative history of the 1959 amendments to the NLRA establishes that Congress did not intend to exclude all foreign-flag vessels, ipso facto, from coverage of the NLRA.

On May 23, 1958, the National Labor Relations Board rendered its decision in *Peninsular & Occidental* (P & O) *Steamship Co.*, 120 NLRB 1097, 42 LRRM 1113, holding that the NLRA applied to a Liberian-flag vessel with predominant connections to the United States. The decision was duly and widely publicized not only in the general press but particularly in the industry.

At the same time, Congress was itself thoroughly familiar with the entire flag-of-convenience controversy. As this Court noted in 1953, it had already by that time become "common knowledge" that ship owners were seeking to avoid laws by resort to nominal foreign registrations eagerly offered. *Lauritzen* v. *Larsen*, 345 U.S. 571, 587. Repeated Congressional investigations and inquiries since at least 1952 established beyond denial that Congress by 1959 was completely and thoroughly familiar with the contentions of both American labor and American ship owners concerning the effect of such nominal foreign registrations. See, e.g., *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet before the Subcommittee on the Merchant Marine*, 85th Cong., 1st Sess. (1957); *Hearings before the Subcommittee on Merchant Marine*, 86th Cong., 1st Sess., (1959).

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as well is aptly illustrated by the injunction obtained against the 1961 nation-wide maritime strike under the emergency provisions of the NLRA, and as a sequel thereto, the appointment by Secretary of Labor Goldberg of a three-man review board to study the flag-of-convenience controversy. See *U.S.* v. *Marine Engineers* (CA 2), 48 LRRM 2937 and 48 LRRM 2605; N.Y. Times, Sept. 20, 1961; p. 47.

See also CCH Labor Law Reports Summary No. 169, July 26, 1962, where the Bethlehem Steel Corporation offered to place two American deck officers aboard its foreign-flag vessels for every one American officer displaced by automation on its American-flag vessels.

Thereafter, in September, 1959, Congress undertook perhaps the most thorough and sweeping review of NLRB jurisdiction since passage of the original Wagner Act in 1935. The consequence of this review, in which Congress certainly had before it the limits to which the Board had up until then asserted its jurisdiction, was the passage of the Landrum-Griffin amendments to the NLRA. Significantly, these amendments included a new Section 14(c)(1) to the Act which expressly and clearly stated that:

> "* * * Provided, that the Board *shall not* decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (Emphasis added.)

In brief, the SIU respectfully submits that Congress in passing Section 14(c)(1) to the NLRA confirmed and ratified the NLRB's ruling in its May, 1958, *P & O* decision. Certainly it is a fair assumption that Congress had actual knowledge of the Board's assertion of jurisdiction in *P & O*, not only from the press, but from its simultaneous study of the Board's assertion of jurisdiction and of the foreign-flag controversy. Had Congress considered that the Board had wrongfully applied the NLRA in *P & O*, the obvious solution was readily at hand—a clause withdrawing application of the Act to any vessel flying a foreign flag. Instead, Congress did exactly the opposite: it "froze" the jurisdiction of the Board as such jurisdiction had been asserted up to August 1, 1959, and also provided for even wider application of the Act in the future. As stated in Senate Report No. 187, 86th Cong., 1st Sess. (April 14, 1957),[6] one purpose of the Landrum-Griffin amendments was:

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[6] As reproduced in Vol. 2, U.S. Code Congressional and Administrative News (1957), at p. 2343.

"1. To require that the National Labor Relations Board exercise its jurisdiction to the full extent permitted by the commerce clause."

The SIU respectfully submits that if the NLRA is truly to be applied to the full extent permittted by the Commerce Clause, then surely the single factor of a vessel's nominal registry with a flag-of-convenience nation is not conclusive of the NLRA's application.

Conclusion

For the foregoing reasons, the SIU respectfully urges that this Court in review of this case reject the contention of petitioner that the flag or foreign registry of a vessel, alone and by itself, precludes the application of the NLRA in all cases. Such a rule would be unique and unrealistic. Rather, the application, *vel non*, of the Act should depend upon a weighing of all connective links between the vessel, this Nation, and other nations in the light of the over-all policy of the NLRA to promote the full and normal flow of this Nation's commerce. Since the evaluation of these various connecting factors is primarily a factual inquiry, it is finally submitted that the New York Court of Appeals was correct in applying the "arguably subject" rule stated in *San Diego Building Trades Council Unions* v. *Garmon*, 359 U.S. 236, 245, and that the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief as Amicus Curiae were served by mail this — day of August, 1962, upon Breck P. McAllister, Esquire, 2 Wall Street, New York 5, New York, counsel for Petitioner, Incres Steamship Company, Ltd., and upon Herman E. Cooper, Esquire, and H. Howard Ostrin, Esquire, 655 Madison Avenue, New York 21, New York, counsel for Respondents.

_____,

of Counsel.

(3642-6)